IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 30TH MAY 2007 / 9TH JYAISHTA 1929

CRL.A.No. 2504 of 2006(B)

SC.350/2003 of ADDL. SESSIONS COURT (ADHOC), KALPETTA

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APPELLANT: (RESPONDENT):

MALAKKARI, S/O. NENCHI,
C.NO.3232, CENTRAL PRISON,
KANNUR.

BY ADV. ADV.C.T JESTIN (STATE BRIEF)

RESPONDENTS: (COMPLAINANT):

STATE OF KERALA,
EXCISE RANGE, MANANTHAVADY,
CR.NO.11/02.

BY PUBLIC PROSECUTOR SRI.K.S.SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28/05/2007, THE COURT ON 30/05/2007 DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

Crl. Appeal No. 2504 OF 2006 B

Dated this the 30th day of May, 2007

J U D G M E N T

In this appeal preferred from the Central Prison, Kannur, the appellant, who was the accused in the Sessions Case No.350/2003 on the file of the Additional Sessions Court(Adhoc-I), Kalpetta for an offence punishable under section 55(a) of the Abkari Act challenges the conviction entered and the sentence passed against him by the said court for the aforesaid offence.

2. The case of the prosecution is that at about 5.50 p.m. on 06.07.2002 the accused was found transporting 3.500 litres of Karnataka arrack in 35 packets, each packet containing 100 ml., in a KSRTC bus proceeding to Edakot from Bavali and that the accused has thereby committed an offence punishable under section 55(a) of the Abkari Act.

3. On the appellant pleading not guilty to the charge framed against him by the court below for the aforementioned offence, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined eight witnesses as PWs 1 to 8 and got marked ten documents as Exhibits P1 to P10 and three material objects as MO1 series, MO2 series and MO3.

4. After the close of the prosecution evidence, the accused was questioned under section 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the trial court did not consider this to be a fit case for recording an order of the acquittal under section 232 Cr.P.C., the accused was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. He did not adduce any defence evidence.

6. The learned Additional Sessions Judge after trial, as per judgment dated 3.3.2006 found the appellant guilty of the offence and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1 lakh and on default to pay the fine, to suffer rigorous imprisonment for six months more. It is the said judgment which is assailed in this appeal.

7. I heard Advocate Sri.C.T.Jestin, the learned counsel who defended the appellant on State Brief and Advocate Sri. K.S.Sivakumar, the learned Public Prosecutor, who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not.

The point:

9. PW1 was the Excise Preventive Officer, Mananthavady, who detected the offence. PW2 is another Preventive Officer, who accompanied PW1. PW3 is the Conductor of the KSRTC bus from which the contraband liquor packets were seized. PW4 is the Driver of the KSRTC bus. He turned unfriendly to the prosecution. PW5 is the independent witness, who had attested Ext.P2 seizure mahazar. PW6 is the Excise Preventive Officer, who conducted a part of the investigation. PW7 is another Excise Preventive Officer, who also conducted a part of the investigation. PW8 is the Excise Inspector, who laid the charge before court.

10. Advocate Sri.C.T.Jestin, learned counsel appearing for the appellant, made the following submission before me in support of his fervent plea for acquittal of the appellant:-

Eventhough PW6 would say that he had produced the properties before the court on 8.7.02, Ext.P7 property list will show that the properties were actually produced only on 16.7.02. Similarly, as against the testimony of PW6 that he submitted the forwarding note on 8.7.02. The covering letter of the Magistrate would show that it is dated 23.7.02. Ext.P10 certificate of chemical analysis would refer to a letter dated 12.8.02 of JFCM-II, Mananthavady. But the office copy of the covering letter available in the files bears the date 23.7.02 and not 12.8.02. The Excise Guard Vijayan with whom the sample was entrusted for being forwarded to the Chemical Examiner has not been examined as a

witness.

11. I am afraid that I cannot agree with the above submissions. PW1, who is the Excise Preventive Officer, who detected the offence has credibly stated that at about 5.50 p.m. on 6.7.02 he intercepted the KSRTC bus proceeding from Bavali to Edakot to find the accused transporting 35 packets of contraband liquor with each packet containing 100 ml. of the liquor. He opened two out of the 35 packets and emptied the contents into a bottle having a capacity of 375 ml. He could identify the contents of the two packets to be illicit arrack by smell and taste. After packing and sealing the sample bottle, he seized the same together with the remaining 33 packets under Ext.P2 mahazar. The accused was arrested and taken to the Excise office together with the contraband substance and the seized documents. PW6 was the Preventive Officer, who registered the crime and conducted the preliminary investigation of the case. Since 7.7.02 was a Sunday, PW6 produced the properties before the Magistrate on 8.7.02. Ext.P7 property list shows that the list as well as the properties were produced before the Magistrate on 8.7.02. On the same date itself, the Magistrate has made an endorsement on Ext.P7 property list directing his office to verify. Presumably, after verification of the properties with reference to the description contained in Ext.P7 property list the Junior Superintendent of the court received the same on file on 16.7.02 as PR 169/2002. The description of the properties, inter alia, shows that item 2

was the sample bottle and the seal on it was found in tact. The files disclose that on 8.7.02 itself PW6 had submitted the forwarding note before the court requesting to despatch the sample bottle to the Chemical Examiner for analysis. Eventhough the covering letter of the Magistrate while forwarding the sample to the Chemical Examiner after entrusting the same with Forest Guard Vijayan is dated 23.7.02, the seal of the despatch section shows that the said letter was despatched only on 12.8.02. That explains the reference to the letter dated 12.8.02 made mention of in Ext.P10 certificate of chemical analysis. Ext.P10 shows that the seal on the sample bottle was in tact and was found tallying with the sample seal separately provided by the Magistrate. This shows that the sealed sample bottle which was entrusted with the Excise Guard Vijayan had reached the hands of the Chemical Examiner in the same condition in which it was entrusted. Ext.P10 certificate shows that the sample contained 35.82% by volume of Ethyl Alcohol. If so, there cannot be any doubt that the contents of two out of 35 packets carried by the appellant were arrack. Possession, import, export, transport, transit, storage and sale of arrack in the State of Kerala has been totally banned with effect from 3.6.1997. If so, possession or transportation of even a small quantity of arrack after the said date will be in contravention of the prohibition contained in section 8(1) of the Abkari Act and is punishable either under section 8(2) or under section 55(a) of the Abkari Act. The appellant was thus rightly convicted for the

offence punishable under section 55(a) of the Abkari Act.

12. The sentence imposed on the appellant also cannot said to be excessive or disproportionately harsh. I am not inclined to interfere with the sentence imposed on the appellant as well.

In the result, this Criminal Appeal fails and is accordingly dismissed confirming the conviction entered and the sentence passed against the appellant.

(V. RAMKUMAR, JUDGE)

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Crl. Appeal No. 2504 OF 2006 B

J U D G M E N T

30th May, 2007